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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF AKRON,

Petitioner,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR LIFE IN SUPPORT OF PETITIONER, CITY OF AKRON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT:

I.

Appropriate Respect For State Legislative Discretion Requires That Strict Scrutiny Be Invoked Only When Clearly Warranted By The Constitution 4

II.

To Select The Correct Level Of Review For A Law Which Relates To Abortion, A Court Must Determine Whether The Law In Fact Has A Constitutionally Cognizable Impact On The *Roe* Liberty, Whether Any Impact That Does Exist Primarily Benefits Or Burdens Its Exercise, And Whether Any Burden Is Substantial Or Insubstantial 7

A. A Law Which Relates To Abortion But Has No Impact On The *Roe* Liberty Is Constitutional 7

B. A Law Which Impacts On The *Roe* Liberty By Benefiting Its Exercise Invokes Not Strict Scrutiny But Rational Basis Review 12

C. A Law Which Substantially Burdens The *Roe* Liberty Invokes Strict Scrutiny But A Law Which Insubstantially Burdens That Liberty Invokes Only Rational Basis Review 18

III.

A Law Which Relates To Abortion Is Constitutional Unless, When The Impact Of The Law On The *Roe* Liberty Is Considered Together With The State Interests The Law Serves, And These Are Weighed In Accordance With The Applicable Level Of Review, The Law *Unduly* Burdens That Liberty 21

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198 (6th Cir. 1981) 5, 19
Bellotti v. Baird I, 428 U.S. 132 (1976) 18, 22, 25
Bellotti v. Baird II, 443 U.S. 622 (1979) 20, 22
Carey v. Population Services Int'l., 431 U.S. 678 (1977) 3, 8, 18, 19, 21
Charles v. Carey, 627 F.2d 772 (7th Cir. 1980) 5, 7
Colautti v. Franklin, 439 U.S. 379 (1979) 10
Connecticut v. Menillo, 423 U.S. 9 (1975) 8, 10
Doe v. Bolton, 410 U.S. 179 (1973) 7, 10, 20, 21
Griswold v. Connecticut, 381 U.S. 479 (1965) 18
H.L. v. Matheson, 450 U.S. 398 (1981) 9
Harris v. McRae, 448 U.S. 297 (1980) 7, 9, 17
Maher v. Roe, 432 U.S. 464 (1977) 7, 8, 15, 18, 19, 20, 22
Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) 4, 24
Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) ..... *passim*
Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*

San Antonio Independent Sch. District v. Rodriguez, 411 U.S. 1 (1973) 13, 14
Whalen v. Roe, 429 U.S. 589 (1977) 8, 10, 11
Wynn v. Scott, 449 F. Supp. 1302 (1978), *aff'd sub nom.* Wynn v. Carey, 559 F.2d 193 (1979) 10

Constitutional Provisions

U.S. Const. amend. V 6
U.S. Const. amend. XIV, § 1 ..... 6, 8

Other Authorities

Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972) 4, 5
Zekman & Warrick, The Abortion Profiteers (1978) 23

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BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR LIFE IN SUPPORT OF PETITIONER, CITY OF AKRON

INTEREST OF THE *AMICUS CURIAE*

Americans United for Life (AUL) is a national educational foundation organized to promote better understanding of the humanity and value of unborn human life, and to assure equal protection under law for all members of the human family regardless of age, health, or condition of dependency. The national office of Americans United for Life is located in Chicago, Illinois. AUL is supported by thousands of Americans from every state of the union.

SUMMARY OF ARGUMENT

The threshold question in evaluating the constitutionality of abortion-related legislation is whether to employ strict scrutiny or the rational basis standard, a question that often determines whether the law will be stricken or upheld. Due deference to state legislative discretion counsels that strict scrutiny should be invoked only when the Constitution clearly warrants its application, yet lower federal courts have hastened to apply it to virtually all legislation bearing on abortion. There is a need, therefore, for this Court to set out clearly articulated principles governing the application of strict scrutiny to abortion-related legislation. It is the purpose of this brief to set forth those principles as applied in the previous decisions of this Court.

In evaluating the constitutionality of abortion-related legislation, a court should first ask whether a statutory provision impacts on the freedom of choice to abort or bear a child. That liberty has been delineated by this Court, not as a right to abortion, but as a right to choose and to have safe access to the effectuation of that choice. Laws which do not create obstacles in the way of an abortion do not impact on the liberty, whether they are laws which may influence a woman to carry her child to term, laws which impact on physicians who provide abortions, laws which assure the medical consultation without which the liberty does not exist, or laws protective of the fetus or of other state interests. Therefore, such laws are constitutional.

The court's second inquiry should be whether statutory provisions that do impact on the *Roe* liberty do so in a manner that benefits or burdens its exercise. To

the extent that a provision enhances the exercise of the liberty, it should not be subject to strict scrutiny. The rationale behind strict scrutiny is that heightened judicial vigilance is called for when a legislature acts to threaten a fundamental right. This rationale disappears when the effect of the enactment is to foster the right. This conclusion, which is congruent with the conduct of the Court in previous cases, has implications for issues currently before this Court. It suggests that laws in areas such as informed consent, pathological reporting, and hospitalization and waiting period requirements may be subject only to rational basis review since the impact of such provisions on the *Roe* liberty may be primarily to benefit its exercise.

The Court's third inquiry should be whether any burden that does exist is substantial or insubstantial. Under *Carey v. Population Services*, 431 U.S. 675, 688 & 688n.5 (1977), only laws that completely prohibit or substantially restrict access to abortion are subject to strict scrutiny. If the burden is only insubstantial, the rational basis test applies.

Once the court has established the standard of review, it must apply it to particular circumstances in order to determine whether the provisions at stake "unduly burden" the *Roe* liberty. In the case of provisions which both benefit and burden the liberty, the court must analyze the benefit and burden to decide which outweighs the other. The provisions should be upheld as constitutional unless, when weighed against the benefit to the protected interests of the pregnant woman and against any other state interests at stake, the burden associated with the provisions is found to be "undue."

ARGUMENT

I.

APPROPRIATE RESPECT FOR STATE LEGISLATIVE DISCRETION REQUIRES THAT STRICT SCRUTINY BE INVOKED ONLY WHEN CLEARLY WARRANTED BY THE CONSTITUTION.

The threshold issue arising in the context of a case that involves abortion legislation—or, indeed, any legislation that implicates a fundamental right—concerns the appropriate judicial posture in considering the constitutionality of the law. The question is whether the challenged provision warrants "close" or "strict" judicial scrutiny, or whether it merits the "relatively relaxed" "rational-basis standard." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

The answer to this initial inquiry will often predetermine the outcome of the ensuing judicial analysis. Few laws can withstand the systematic scepticism appropriate to heightened judicial scrutiny. Of the hundreds of thousands of statutes, ordinances, and regulations that have issued from our various legislative bodies few relate to such traditionally vital concerns or immediately urgent matters that they serve "compelling" interests. Even fewer are drawn with such fine precision and careful attention to individual circumstances that they are "narrowly drawn" to serve only compelling governmental interests. *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

On the other hand, few laws fail to serve some "valid" or "legitimate" governmental interest, and few of those that do are so incoherent or misdirected that they bear

no conceivable "rational relation" to the valid interests they purport to serve. See *id.*

The question whether strict or relaxed scrutiny of a law is appropriate implicates issues central to the proper role of the judiciary and the posture it should take toward the legislature. Applying strict judicial scrutiny to duly enacted legislation when not clearly required by the Constitution provides insufficient deference to the legislature, an equal branch of government, and to the democratic process which generates statutory law.

"Strict scrutiny" flows from the duty of the judiciary to protect constitutionally recognized rights from overbearing democratic majorities. At the same time, strict scrutiny should not be employed unless the law at issue clearly and substantially limits the exercise of some fundamental right. Unwarranted use of this ultimate weapon in the judicial arsenal implies insufficient respect for legislative rights and the integrity of the democratic process.

The Sixth Circuit in this case hastened to apply strict scrutiny to virtually any legislation that bears upon abortion. *Akron Center for Reproductive Health v. City of Akron*, 651 F.2d 1198, 1203-1204 (6th Cir. 1981); *see also, Charles v. Carey*, 627 F.2d 772, 776-78 (7th Cir. 1980). To avoid such errors, there is a pressing need for this Court clearly to articulate the principles to be used in selecting the appropriate standard for reviewing abortion related legislation.

The limited purpose of this brief is to assist the Court in that task by distilling a basic framework of analysis from this Court's previous opinions.

This framework suggests that a court reviewing legislation relating to abortion should first ask whether

the legislation's provisions in fact impact on the liberty recognized in *Roe v. Wade*, 410 U.S. 113 (1973). If they do not, a challenge based on the Due Process Clauses of the Fifth and Fourteenth Amendments should fail, while one based on the equal protection components of these amendments should be examined under the rational basis standard. See this brief at p. 17 n. 5.

Second, the Court should ask whether legislation which does have an impact on the *Roe* liberty primarily benefits the exercise of that right. If it does, even if its impact on the liberty is substantial, it should be examined under the rational basis standard—unless it also creates a substantial burden on the liberty.

Third, the court should ask whether the provisions which do burden the exercise of the liberty do so substantially or insubstantially. Only substantial burdens should invoke strict scrutiny. Otherwise the rational basis standard should apply.

Once the proper level of review has been selected, the court should apply the well-established criteria for balancing the rights of the pregnant woman against the interests of the State. When dealing with provisions which benefit as well as burden the liberty at stake, however, the court should carefully balance the benefit and the burden, employing whichever standard of review is applicable, to ensure that the provision is declared unconstitutional only if the burden is "undue."

II.

TO SELECT THE CORRECT LEVEL OF REVIEW FOR A LAW WHICH RELATES TO ABORTION, A COURT MUST DETERMINE WHETHER THE LAW IN FACT HAS A CONSTITUTIONALLY COGNIZABLE IMPACT ON THE *ROE* LIBERTY, WHETHER ANY IMPACT THAT DOES EXIST PRIMARILY BENEFITS OR BURDENS ITS EXERCISE, AND WHETHER ANY BURDEN IS SUBSTANTIAL OR INSUBSTANTIAL.

A. A Law Which Relates To Abortion But Has No Impact On The *Roe* Liberty Is Constitutional.

As the Seventh Circuit Court of Appeals correctly recognized, "a law is not considered an interference with the pregnancy termination decision and subject to strict scrutiny simply because it concerns abortion." *Charles*, 627 F.2d at 776. "[T]he right in *Roe v. Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it." *Maher v. Roe*, 432 U.S. 464 (1977).

In the first place, the law must have an impact on some recognized facet of the abortion liberty. What is that liberty?

"The constitutional right vindicated in *Doe* [*v. Bolton*, 410 U.S. 179 (1973) and *Roe v. Wade*] was the right of a pregnant woman to decide whether or not to bear a child without unwarranted state interference." It is a "freedom of personal choice." *Harris v. McRae*, 448 U.S. 297, 312 (1980). This constitutionally secured right "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Maher*, 432 U.S. at 473-74. The liberty secured in *Roe v. Wade* is "not . . . an unqualified constitutional right to an abortion" but rather "a constitutionally protected interest 'in making [a] certain kind of important decision . . .' free from governmental

compulsion." *Id.* at 473 (quoting *Whalen*, 429 U.S. 589, 599-600 & nn. 24 & 26 [1977]). "A woman has at least an equal right to choose to carry her fetus to term as to choose to abort it." *Maher*, 432 U.S. at 472 n. 7.

As a necessary corollary to freedom to decide, the right secured in *Roe* also protects "the effectuation of [the] decision from unduly burdensome state-created obstacles." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 70 n. 11 (1976). Thus, *access* to both childbirth and abortion is an important aspect of the *Roe* liberty. "[S]uch access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in . . . *Roe v. Wade.*" *Carey v. Population Services International*, 431 U.S. at 688-89.

In addition to choice and access, *safety* is the third recognized aspect of the abortional liberty. *Roe v. Wade* recognized "a woman's right to clinical abortion by medically competent personnel." *Connecticut v. Menillo*, 423 U.S. 9, 10 (1975). "Jane Roe had sought to have an abortion 'performed by a competent, licensed physician, under safe, clinical conditions,' [*Roe*, 410 U.S. at 120], and our opinion recognized only her right to an abortion under those circumstances." *Id.* The Constitution protects access only to "an abortion 'performed . . . under safe, clinical conditions,' [*Roe*, 410 U.S. at 120]." *Connecticut v. Menillo*, 423 U.S. at 10. Safety is an essential attribute of the right: "Our opinion recognized *only* [the] right to an abortion *under those circumstances.*" *Id.* (emphasis added). The State has no constitutional obligation to permit unsafe conditions in the performance of abortions.

The Fourteenth Amendment, then, protects from unduly burdensome state interference *choice* between

childbirth and abortion, and *access* to both under *safe* conditions.

When can it be said that a state action impacts on this constitutionally protected right?

Laws do not impact on the *Roe* liberty merely because they influence the woman to carry her child to term. "The Constitution does not compel a State to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action 'encouraging childbirth except in the most urgent circumstances' is 'rationally related to the legitimate governmental objective of protecting potential life.'" *H. L. v. Matheson*, 450 U.S. 398, 413 (1981) (*quoting Harris v. McRae*, 448 U.S. at 325. Thus, a law does not have an impact on the liberty to choose merely because it discourages abortion or makes it less likely that a woman will choose abortion. Moreover, the *Roe* liberty assures only that "government may not place obstacles in the path of a woman's exercise of her freedom of choice." It does not require the government to "remove those not of its own creation." *Harris*, 448 U.S. at 316. For this reason, neither a governmental failure to subsidize the effectuation of the constitutionally protected choice, nor an unequal subsidization of the protected alternatives in that choice—childbirth or abortion—has a constitutionally cognizable impact on the liberty recognized in *Roe*.

It is also clear that, because the *Roe* liberty is personal to the pregnant woman, third-party providers of services related to the woman's protected choice can assert no rights independent of those of the pregnant woman. Thus, for example, "statutory restrictions on . . . abortion procedures [may be] invalid because they [encumber] the woman's exercise of that constitutionally protected right by placing obstacles in the path of the doctor upon whom she [is] entitled to rely for advice

in connection with her decision." If, however, "those obstacles [do not impact] upon the woman's freedom to make a constitutionally protected decision, if they . . . merely [make] the physician's work more laborious or less independent without any impact on the patient, they [do not violate] the Constitution." *Whalen*, 429 U.S. at 605 n. 33.

At the same time, the liberty exists only within the context of consultation with a physician. "[T]he attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. *If* that decision is reached, the judgment may be effectuated by an abortion free of interference by the State." *Roe*, 410 U.S. at 163 (emphasis added). The Court has upheld, therefore, a criminal ban on all abortions with regard to which a physician has not made a determination "based on his best clinical judgment that an abortion is necessary." *Doe v. Bolton*, 410 U.S. at 191. The Supreme Court has "stressed repeatedly the role of the physician . . . in consulting with the woman whether or not to have an abortion. . . ." *Colautti v. Franklin*, 439 U.S. 379, 387 (1979). *See also Connecticut v. Menillo*, 423 U.S. at 10. Laws that prevent abortions obtained without appropriate medical consultation, therefore, do not impact on the protected right.

Finally, the "constitutional right vindicated" is that "of a pregnant woman to decide whether or not to *bear* a child." *Whalen*, 429 U.S. at 605 n. 33 (emphasis added). It does not restrain the State from preventing hostile activity directed toward the fetus unrelated to the woman's interest in choosing whether or not to remain pregnant. *See Wynn v. Scott*, 449 F.Supp. 1302, 1321 (1978), *aff'd sub nom. Wynn v. Carey*, 559 F.2d 193 (1979) (the right secured in *Roe* is to expel contents of

the uterus, not to ensure the death of the fetus.) State regulation of abortion is not limited by the Constitution as a matter of absolute, abstract principle, but only to the extent that such regulation unduly burdens or obstructs the exercise of the woman's choice to terminate pregnancy or carry a child to term. Thus, regulation of abortion on behalf of maternal health, on behalf of the fetus, or on behalf of any other state interest—even in the first trimester—does not automatically trigger strict scrutiny. It does so only if it obstructs exercise of the right secured in *Roe*.

In sum, to have a constitutionally cognizable impact on the abortion liberty recognized by this Court, statutory provisions must impose a state-created restriction on the "choice," "access" or "safety" facets of the abortional liberty. If they do not—if they merely touch or relate to abortion without "impact[ing] upon the woman's freedom to make a constitutionally protected decision" (*Whalen*, 429 U.S. at 605)—they are not unconstitutional.

Laws do not impact on the liberty recognized in *Roe* merely because they discourage abortion or make it less likely that the woman will procure abortion, deny governmental assistance for abortion, merely make the physician's work more laborious or difficult, foreclose performance of abortion without appropriate medical assistance or consultation, or regulate aspects of abortion that do not relate to the woman's right to be free of a pregnant condition. Such laws do not even implicate the liberty acknowledged in *Roe* and are therefore constitutional.

B. A Law Which Impacts On The *Roe* Liberty By Benefiting Its Exercise Invokes Not Strict Scrutiny But Rational Basis Review.

Once it has been determined that a challenged statutory provision does have a constitutionally cognizable impact on a recognized facet of the abortion liberty, the next question is whether that impact is primarily positive or negative. A law which serves primarily to *enhance* the exercise of the liberty should not be subject to strict scrutiny. This is the case even if there are restrictions on the liberty's exercise incident to the primarily beneficial effect, so long as such incidental restrictions do not amount to a substantial burden on its exercise.[1]

The notion behind strict scrutiny is that a heightened level of judicial vigilance is necessary when a legislature embarks on a course of action which threatens fundamental rights protected by the Constitution, because such a course of action is prima facie suspicious. But when a legislature acts in a manner that genuinely facilitates the exercise of a right, the rationale for heightened scrutiny disappears, and its application can be counterproductive.[2]

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[1] *See* Section II C, *infra*. There are few benefits without burdens. Even the simple and beneficially protective traffic signal causes a delay in travel. So it is with abortion. *Any* restriction in some sense burdens access: consider the physician requirement discussed above. Only when the burdens inevitably incident to any benefit are substantial should they trigger strict scrutiny. Of course, whatever the level of review, burdens of any nature, substantial or not, must be weighed against the benefits to determine if the burdens are "undue." See Section III for a discussion of the analysis appropriate to such a weighing, which is not pertinent to the threshold determination of what should be the level of review.

[2] Consider, for example, what would happen if the physician requirement were to be subjected to strict scrutiny. Assuming that it passed the "ends" test of being justified by a compell-

(Footnote continued on following page)

In *San Antonio Independent Sch. District v. Rodriguez*, 411 U.S. 1, 17 (1973) the Court declined to apply strict scrutiny to a public education financing system which allegedly discriminated in the provision of education on the basis of wealth. The Court said,

> We find this a particularly inappropriate case in which to subject state action to strict judicial scrutiny. The present case, in [a] basic sense, is significantly different from any of the cases in which the Court has applied strict scrutiny . . . . Each of our prior cases involved legislation which "deprived," "infringed," or "interfered" with the free exercise of some . . . fundamental personal right or liberty. A critical distinction between those cases and the one now before us lies in what Texas is endeavoring to do with respect to education. . . . Every step leading to the establishment of the system Texas utilizes today . . . was implemented in an effort to *extend* public education and to improve its quality. . . . [W]e think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial

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[2] *continued*

ing state interest, it would still have to be analyzed under the "means" requirement that it be narrowly drawn. It could well be argued that the physician requirement was both unconstitutionally overinclusive and underinclusive: overinclusive because it banned abortion performed, for example, by experienced midwives who could provide safe abortions; underinclusive because it permitted abortion by, for example, ophthamologists without the experience or expertise necessary to make an abortion safe. Were a strict scrutiny level of review imposed, it might lead to the conclusion that the only constitutional approach to the matter would be the administration of some kind of abortion proficiency test to aspiring laymen and physicians alike in order to select qualified abortion practitioners. Clearly, the Court has deemed so strict an approach inappropriate to impose upon States seeking to ensure the woman's safety, and thus benefit the *Roe* liberty, by legislating that only physicians may perform abortions.

> principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution.

Id. at 37-39 (citations omitted) (emphasis in original).

Although some courts have read *Roe* to prohibit all regulation during the first trimester except when the State has a "compelling interest" which justifies its regulation, uniform application of strict scrutiny to first trimester regulations is unwarranted.

In *Danforth*, this Court upheld state abortion regulations which applied to the first trimester without applying strict scrutiny. In their concurring opinion, Justices Powell and Stewart emphasized the basic difference between regulations intended to enhance the woman's exercise of her fundamental right and those intended to burden it.

> While [the informed consent provision] obviously regulates the abortion decision during all stages of pregnancy, including the first trimester, I do not believe that it conflicts with [*Roe*, where the Court stated that during the first trimester the woman, in consultation with her physician, is free to determine to abort without state interference, 410 U.S. at 163, because] [t]hat statement was made in the context of a law aimed at thwarting a woman's decision to have an abortion. It was not intended to preclude the State from enacting a provision aimed at ensuring that the abortion decision is made in a knowing, intelligent, and voluntary fashion.

428 U.S. at 89-90 (Stewart, J. concurring).

The Court also upheld recordkeeping requirements applicable to the first trimester. Noting that "maintenance of records . . . may be helpful in developing information pertinent to the preservation of maternal health", the Court said, "Recordkeeping of this kind, if not abused

or overdone, can be useful to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment." *Id.* at 80, 81. Thus, a law that actually enhanced the pregnant woman's health interest was examined under the rational basis test, even though it regulated abortion in the first trimester.

In so doing, this Court has recognized that abortion regulations may be motivated by one of two very different types of concerns. One is on behalf of the fetus,[3] an interest adverse to the constitutionally protected interest of the pregnant woman. Regulation on behalf of the fetus is by no means inherently unconstitutional, or even inherently subject to strict scrutiny. Such regulation does necessarily require, however, that the weight of the state interest be balanced against that of the pregnant woman's constitutionally protected interests.

On the other hand, the effect of a State action may genuinely weigh in favor of the woman's interests—a regulation may foster and enhance the exercise of her liberty. In such a case, unless the regulation also entails a substantial burden on the *Roe* liberty, there is no logical reason to employ strict scrutiny merely because the impact of the regulation on the liberty is substantial.

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[3] Theoretically, the State could seek to further other interests adverse to those of the pregnant woman through abortion regulation. *Roe* briefly mentioned, for example, the possibility of a "concern to discourage illicit sexual conduct." 410 U.S. at 148. (As *Roe* pointed out, however, no one, including any defender of state statutes, "has taken the argument seriously." *Id.*) *Maher v. Roe*, 432 U.S. at 478 n. 11, notes the possibility of demographic interests in a State's "rate of population growth."

This Court's decision in *Danforth*, therefore, demonstrates that a threshold determination concerning whether the primary impact of the challenged statutory provision enhances or encumbers the *Roe* liberty is crucial in selecting the proper level of review. This principle has implications for some of the kinds of state laws relating to abortion now before this Court for review.

For example, laws that ensure that a woman contemplating the choice between abortion and childbirth be given information material to her decision tend to enhance the "choice" aspect of the *Roe* liberty. It is inappropriate to apply strict scrutiny to such laws merely because they have an impact on the *Roe* liberty if they in fact servc the very interest the liberty protects: the interest of the woman in making a voluntary, competent, and autonomous choice whether or not to carry a child to term. Of course, to achieve this result the legislation must in fact genuinely enhance the possibility of free and reflected choice. To the extent such laws purvey what is false, misleading, confusing or inflammatory (as opposed to informative) they do not enhance but burden the choice.[4] But a law that merely requires that women be provided with certain objective

[4] Such circumstances, which vitiate the potentially beneficial aspects of informed consent, are to be distinguished from circumstances which may create burdens incidental to still present beneficial aspects. For example, the sheer volume of data that must be provided to the woman might create a burden. This volume would not remove the benefit, but might outweigh it. The proper analysis is to weigh such a burden against the benefit to determine if the burden is "undue" and thus if the legislation is unconstitutional as discussed in Section III. By contrast, the threshold question, discussed here, is whether the challenged provision in fact benefits the liberty —even if it also has burdensome aspects—or only purports to do so, in order to establish the correct standard of review.

information that may materially affect the outcome of their decisions between childbirth and abortion should not for that reason be subjected to strict scrutiny, because such a law fosters, rather than inhibits, the constitutionally protected liberty.

In sum, a court considering a challenge to a legislative provision that impacts on the *Roe* liberty should determine whether the provision has the primary effect of enhancing some aspects of that liberty's exercise. If it does, then unless the provision carries a concomitant burden on the liberty which is *substantial* (see the next section of this brief), the Court should employ the rational basis standard in deciding the constitutionality of the provision.[5]

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[5] If a statutory provision literally has no constitutionally cognizable impact on the liberty recognized in *Roe* (*see* Section IIA of this brief), constitutional analysis ends with this conclusion. There is no need to apply the rational basis test because that which has no adverse burden *at all* on constitutionally protected rights need not even be justified by a state interest. (This changes if, in addition to or instead of a substantive due process violation, an equal protection violation is alleged. In such a case, a determination that no fundamental right is infringed—or suspect class discriminated against—means only that strict scrutiny need not be employed; the rational basis test must still be met. *Cf.* the treatment in *Harris* of a substantive due process challenge, 448 U.S. at 312-18 with the treatment in the same case of an equal protection challenge, *id.* at 321-26.) In the abstract, a statutory provision whose sole impact on the protected liberty was held to be to benefit its exercise would also require no further constitutional scrutiny. In fact, however, any provision with a constitutionally cognizable but beneficial impact on the liberty will also burden it, no matter how minimally, by limiting access or at least slightly increasing the cost of effectuating a choice. Although an insubstantial burden does not invoke strict scrutiny (*see* Section II C), the fact that it is a burden means that the provision imposing it must undergo rational basis review. This is so because even an insubstantial burden might be "undue" if it was not rationally related to a legitimate state interest.

C. A Law Which Substantially Burdens The *Roe* Liberty Invokes Strict Scrutiny But A Law Which Insubstantially Burdens That Liberty Invokes Only Rational Basis Review.

This Court's clearest description of the degree of burden requisite to trigger strict scrutiny of abortion-related legislative provisions came in *Carey v. Population Services*, 431 U.S. at 688 (emphasis added):

> [T]he same test must be applied to state regulations that burden an individual's right to decide to . . . terminate pregnancy by *substantially* limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely. Both types of regulation "may be justified only by a 'compelling state interest' . . . and . . . must be narrowly drawn to express only the legitimate state interests at stake." *Roe v. Wade*, 410 U.S. at 155.

Justice Powell, concurring in part and concurring in the judgment, voiced his objection to what he saw as an unwarranted imposition of the strict scrutiny standard of review. "In my view, [*Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Roe*] make clear that that standard has been invoked only when the state regulation entirely frustrates or heavily burdens the exercise of constitutional rights in this area. See *Bellotti v. Baird* I, 428 U.S. at 147." *Carey*, 431 U.S. at 705.

The Court specifically responded to Justice Powell's criticism by emphasizing that "state regulation must meet this standard . . . *only* when it 'burden[s] an individual's right to decide to prevent conception or terminate pregnancy by *substantially* limiting access to the means of effectuating that decision.'" *Id.* at 688 n. 5 (emphasis added).

The Sixth Circuit held below that *any* "'direct state interference with a protected activity' [quoting *Maher*,

432 U.S. at 475], here the right of a pregnant woman to have an abortion, . . . is subject to strict scrutiny" and that, "[s]ince the state has no compelling interest during the first trimester . . . [i]f a regulation results in a legally significant impact or consequence on a first trimester abortion decision, it is invalid." *Akron*, 651 F.2d at 12-4. These holdings contradict this Court's ruling in *Carey* and badly misconstrue its holdings in *Danforth*.

In *Danforth*, the Court upheld informed consent (428 U.S. at 65-67) and recordkeeping requirements (*id.* at 79-81) that applied throughout pregnancy, including the first trimester. The Sixth Circuit sought to distinguish these holdings by describing them as "based upon a finding that neither provision involved an intrusion into the decision-making process sufficient to require constitutional analysis[,] . . . not . . . on a holding that the constitutionality of the statute could rest on something less than a compelling state interest." *Akron*, 651 F.2d at 1203. This plainly mischaracterizes the *Danforth* opinion. Rather than treating the informed consent and recordkeeping requirements as though neither "raise[d] a constitutional issue" nor needed to be examined "to determine whether or not the regulatory provision serves a legitimate and [sic] compelling state interest" (*id.* at 1204), the Court related each to a state interest. The informed consent provision was related to the interest in assuring that the "decision to abort . . . be made with full knowledge of its nature and consequences." *Danforth*, 428 U.S. at 67. The recordkeeping provision was related to "the State's interest in protecting the health of its female citizens" and in developing a statistical "resource that is relevant to decisions involving medical experience and judgment." *Id.* at 81.

The section of *Danforth* dealing with the record-keeping requirement, in particular, contains a nuanced discussion of the "important and perhaps conflicting interests affected." *Id.* at 80. The Court did *not* deem "constitutional analysis" unnecessary. On the contrary, it carefully weighed and balanced these interests before holding the provision constitutional. What it did was to apply constitutional analysis in accord with a lower standard of review than strict scrutiny.

This Court has explicitly applied strict scrutiny to invalidate state abortion statutes in only three types of situations, summarized in *Maher*, 428 U.S. at 472-473.

First, strict scrutiny has been applied where a law prohibits abortion altogether. *Roe*, 410 U.S. at 153; *Doe v. Bolton*, 410 U.S. at 200-201 (out-of-state residents). (*See also Danforth*, 428 U.S. at 81-84, in which the Court struck a standard of care provision which "effectively preclude[d] abortion.")

Second, it has been applied where a State seeks to give the decision whether or not to abort to a person other than the pregnant woman herself through some form of "third party veto." *Danforth*, 428 U.S. at 67-75 (spousal consent and parental consent provisions invalidated); *Bellotti v. Baird* II, 443 U.S. 622, 642-644 (1979) (parental and judicial consent invalidated). The "third-party veto" rulings may be viewed simply as delegated powers of prohibition (*cf. Danforth*, 428 U.S. at 69). *Doe v. Bolton*'s strict scrutiny of the hospital committee and two doctor concurrence requirements (410 U.S. at 198), fit within the same framework.

Third, strict scrutiny has been applied where state regulation has so substantially limited access to abortion that a pregnant woman is almost precluded from effectuating her decision to abort. For example, in

Danforth, 428 U.S. at 75-79, the Court invalidated a statute which prohibited saline amniocentesis as a method of abortion. In striking the statute, the Court relied on the fact that "there were severe limitations on the availability of the prostaglandin technique," the alternative to the saline procedure. *Id.* at 77 n. 12. In their concurring opinions, Justices Powell, Stevens and Stewart felt that the statute could be invalidated only because "a prohibition of the saline amniocentesis procedure was *almost tantamount* to a prohibition of any abortion in the State after the first 12 weeks of pregnancy." *Id.* at 92, 102 (emphasis added). Similarly, the Court in *Doe v. Bolton* strictly scrutinized the Georgia requirement that abortions be performed only in hospitals accredited by the Joint Commission on Accreditation of Hospitals because it substantially burdened access to abortion. *Id.* at 193-195.

Thus, this Court, in accord with the *Carey* criteria, has never applied strict scrutiny to an abortion law except when it has found that the law imposed a complete prohibition or substantial burden. It follows that the constitutionality of state regulations that impose only *insubstantial* burdens should be evaluated under the rational basis level of review.

III.

A LAW WHICH RELATES TO ABORTION IS CONSTITUTIONAL UNLESS, WHEN THE IMPACT OF THE LAW ON THE *ROE* LIBERTY IS CONSIDERED TOGETHER WITH THE STATE INTERESTS THE LAW SERVES, AND THESE ARE WEIGHED IN ACCORDANCE WITH THE APPLICABLE LEVEL OF REVIEW, THE LAW *UNDULY* BURDENS THAT LIBERTY.

This Court has "held that a requirement for a lawful abortion 'is not unconstitutional unless it unduly bur-

dens the right to seek an abortion.'" *Maher*, 432 U.S. at 473 (*quoting Bellotti v. Baird* I, 428 U.S. at 147). Once the threshold evaluation has been made and the proper level of review has been selected, it remains to determine whether any "burden" that has been found—"substantial" burden if the strict scrutiny test has been invoked or "insubstantial" burden if the rational basis test is to be employed—is "undue" by weighing that burden against the legitimate or compelling state interests that the burdensome provision advances. This requires testing the sufficiency of the State's "ends" and the appropriateness of the State's "means". The standards for each prong depend on which level of review has been invoked.

Roe explicitly acknowledged two state interests which are "legitimate" throughout pregnancy and which became "compelling" at different stages: the interest in maternal health and the interest in the fetus. 410 U.S. at 162-64.

Subsequent to *Roe*, the Court has acknowledged other interests at stake in an exercise of the *Roe* liberty: in assuring the mutuality of the marital relation and in the paternal interest in the fetus, *Danforth*, 428 U.S. at 67; in assuring the integrity of the woman's decision, *Danforth*, 428 U.S. at 67; in protection of the immature minor and of the interests of her parents, *Bellotti v. Baird* II, 443 U.S. at 635, 637; in development of public health data, *Danforth*, 428 U.S. at 80-81; and in population control, *Maher*, 432 U.S. at 478 n. 11.

Whatever other legitimate or compelling interests a State may have, one which protects the fundamental rights of its citizens must certainly be called compelling. Yet, it is compelling only to the extent that the

provision does foster a fundamental right; and it fosters it only when, on balance, the beneficial effects of the provision outweigh the burdensome effects. It is necessary, therefore, whatever level of scrutiny is used, to weigh the burden against the benefit to see if, in light of the comparative substantiality of the benefit and the burden, the burden is "undue."

For example, consider the constitutionality of a waiting period. A brief waiting period may substantially enhance the prospect of reflected and thereby autonomous rather than coerced or unduly pressured decisions—thus benefiting the "choice" aspect of the *Roe* liberty. In an abstract sense, it might be argued that the greater the time for reflection, the more free and autonomous the choice is likely to be. It seems clear, however, that the benefit is most substantial in association with the first hours or days of a waiting period. It is then that the need is greatest to calm the panic that may accompany discovery of pregnancy, or to withdraw from the perhaps huckstering pressures of an abortion clinic. *See generally* Zekman & Warrick, *The Abortion Profiteers* (1978) (special reprint of *Chicago Sun-Times* series on undercover investigation of abortion clinics). As the waiting period lengthens, the substantiality of the marginal benefit decreases. At the same time, a waiting period of any length burdens the "access" aspect of the same liberty by restricting immediate effectuation of a decision to abort. The substantiality of the burden on access—and perhaps, as the pregnancy progresses, on safety—increases steadily as the waiting period grows longer. Thus, a one day waiting period might greatly enhance the quality of choice while only minimally diminishing access. On the other hand, a one week waiting period would much more substantially diminish ac-

cess, while the marginal benefit to choice of such a length might well be insubstantial.

Similarly, a properly drawn informed consent provision could benefit the liberty recognized in *Roe* by enhancing the autonomy of the woman's choice. Incidentally, it would also burden that liberty by causing a minimal delay, thus affecting access—a burden that in most cases would be so slight as to be *de minimis*. If, however, an otherwise beneficial informed consent regulation were so unreasonable as to require an entire course on fetal development, the substantial delay would overcome the benefit.

Once the nature and weight of the state interests at stake have been identified, and even if they are held sufficient to justify the statutory provision, a "means" analysis testing the relationship of the law to the state interests is still necessary. Under strict scrutiny, the "legislative enactments must be narrowly drawn" (*Roe*, 410 U.S. at 155) in order to further the state interests in a manner which burdens the liberty to the minimum extent necessary to serve those interests. Under the rational basis standard, the enactment need only "rationally further the purpose identified by the State." *Murgia*, 427 U.S. at 314. The significance of the principle that laws which benefit the exercise of the *Roe* liberty are subject to the rational basis test is greatest when the "means" prong is reached. (It makes little difference to the constitutionality of such laws whether the "ends" prong of strict scrutiny or of rational basis review is applied, since, as we have seen, state action which benefits the exercise of a fundamental right by definition serves a compelling state interest.)

Danforth's analysis of the Missouri recordkeeping requirements provides a paradigm for this sort of analy-

sis. The manner in which the Court effectively employed a rational basis rather than a strict scrutiny test has already been discussed. *See* brief at 14-15. The Court carefully weighed the "important and perhaps conflicting interests affected by recordkeeping requirements": the benefit of "the preservation of maternal health" against the burden of "restrictions or regulations governing the medical judgment of the pregnant woman's attending physician with respect to the termination of her pregnancy." 428 U.S. at 80. It concluded that the benefits were important and useful, while the burdens, given a strict protection of confidentiality and a reasonable limit of 7 years for the records' required retention, were not of "significant impact or consequence." *Id.* at 81. The Court warned, however, that were there to be a "sheer burden of recordkeeping detail," the burden could become substantial enough to alter this balance and render a recordkeeping requirement unconstitutional. As for the "means" prong of the test, the Court regarded the requirements to be "reasonably directed to the preservation of maternal health." *Id.* at 80.

Thus, conscientious constitutional analysis requires, not a mechanistic striking of any law that impacts on abortion in the first trimester, but a careful weighing of the benefits and burdens it creates for the *Roe* liberty, as well as of the state interests at stake. Unless, all things considered, "it unduly burdens the right to seek an abortion," *Bellotti* I, 428 U.S. at 147, such a law should be upheld.

CONCLUSION

Proper evaluation of constitutional challenges to statutory provisions that relate to abortion requires a two-step process.

Initially, a court must make a threshold examination to determine what level of review, if any, is appropriate. To do so, the court should first consider whether a statutory provision has a constitutionally cognizable impact on the *Roe* liberty as that liberty is properly understood. If it does not, the law should be upheld if the challenge is based on a due process claim and subjected to a rational basis review if the challenge is based on an equal protection claim.

Second, if there is an impact, the Court should consider whether the impact primarily benefits or burdens the exercise of the *Roe* liberty. If the impact is primarily beneficial, and if any attendant burden is insubstantial, the provision should be subjected to rational basis scrutiny.

Third, if the challenged provision carries a burden on the *Roe* liberty, the Court must determine whether that burden is substantial or insubstantial. If the burden is substantial, the strict scrutiny test is appropriate, but if the burden is insubstantial, the rational basis test should be applied.

Once the threshold is crossed and the level of review is selected, the procedure for evaluation is well settled. Under the strict scrutiny test the Court should determine whether the provision is supported by any compelling state interests, and if so, whether the provision is narrowly drawn to serve only those interests. Under the rational basis test, the Court should determine if the

provision is supported by any legitimate state interests and, if so, whether the provision is rationally related to those interests. When the provision benefits as well as burdens the exercise of the *Roe* liberty, however, the Court must balance the nature and degree of the burden against the nature and degree of the benefit. Unless, given the benefit and any other interests at stake, the burden is "undue," the provision should be upheld as constitutional.

Respectfully submitted,

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